(1)

91-1521

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

LOWELL GREEN

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTION PRESENTED

Whether *Edwards* v. *Arizona*, 451 U.S. 477 (1981), requires the suppression of a voluntary confession because law enforcement officers initiated interrogation of the suspect five months after he invoked his right to counsel in connection with an unrelated offense, where the suspect consulted with counsel and pleaded guilty to the unrelated offense prior to the interrogation.

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals (App., *infra*, 1a-18a) is reported at 592 A.2d 985.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1991. A petition for rehearing was denied on November 25, 1991. App., *infra*, 34a-35a. On February 11, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

1. On July 18, 1989, officers of the District of Columbia Metropolitan Police Department arrested respondent on drug charges. The officers gave respondent a printed advice-of-rights form known as a "PD 47." In response to the printed question whether he was willing to talk to the police without having an attorney present, respondent wrote "No." The officers did not attempt to question him. App., *infra*, 2a.

Respondent appeared in court the following day, and an attorney was appointed to represent him. On July 28, 1989, the drug charges were dismissed at the preliminary hearing. Respondent remained in custody because of an unrelated juvenile matter. App., *infra*, 2a.

In August 1989, respondent was indicted on charges of possessing a controlled substance with intent to distribute it. On September 27, 1989, he entered a plea of guilty to the lesser included offense of attempted possession of a controlled substance with intent to distribute it. App., *infra*, 2a.

Respondent remained in custody awaiting sentencing on the drug charge.[1] On January 4, 1990, a Metropolitan Police Department detective obtained an arrest warrant charging respondent with the unrelated 1988 murder of Cheaver Herriott. The next day, officers brought respondent to the Police Department's

[1] Respondent was held in the Youth Center at Lorton Reformatory while a study was performed to determine his suitability for treatment under the District of Columbia Youth Rehabilitation Amendment Act of 1985. App., *infra*, 2a; see D.C. Code Ann. § 24-803(e) (1989). On February 26, 1990, respondent was sentenced to 15 months' incarceration under the Youth Rehabilitation Act. App., *infra*, 2a.

Homicide Office for booking. The officers advised respondent of his *Miranda* rights, and he agreed to waive those rights. Respondent discussed his involvement in the murder of Herriott with the officers, and they again advised him of his rights. Respondent then made a videotaped statement in which he confessed to his involvement in the robbery and murder. App., *infra*, 3a.

2. Respondent was indicted for murder. He moved to suppress his confession, claiming that it had been obtained in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981). The trial court initially denied the motion. App., *infra*, 19a-30a. The court noted that an "extraordinary amount of time" had elapsed between respondent's invocation of his right to counsel and his confession, and that respondent had had an opportunity to consult with counsel during that time. Under these circumstances, the court concluded that "none of the reasons which underlie the [Supreme] Court's decisions which have addressed a criminal defendant's right to counsel under the [Sixth] Amendment and his right not to incriminate himself under the [Fifth] Amendment, would be served by suppression of these statements." App., *infra*, 25a-26a.[2]

Three days after the trial court's initial ruling, this Court decided *Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990). In light of that decision, the trial court reconsidered its ruling and ordered that respondent's confession be suppressed. App., *infra*, 31a-33a.

3. The District of Columbia Court of Appeals affirmed. App., *infra*, 1a-18a. The court acknowledged

[2] The trial court also rejected respondent's contentions that his confession was involuntary, and that it was obtained during an unnecessary delay in bringing him to court. See App., *infra*, 20a-22a, 26a-28a.

that this case differs from *Edwards* and other cases decided by this Court in several ways.

First, the interrogation concerned an unrelated crime and took place after respondent had consulted with a lawyer. App., *infra*, 6a-8a. The court concluded, however, that *Minnick* and *Arizona* v. *Roberson*, 486 U.S. 675 (1988), should not be "narrow[ed] * * * to their individual settings." App., *infra*, 7a.

Second, the court recognized that this case differs from the *Edwards* line of cases because there was a five-month interval between respondent's invocation of the *Edwards* right and the subsequent interrogation. App., *infra*, 8a-12a. Although the court viewed as "substantial" the government's arguments against a "perpetual irrebuttable presumption," App., *infra*, 9a, 11a (quoting *Minnick*, 111 S. Ct. at 496 (Scalia, J., dissenting)), it concluded that "only the Supreme Court can explain whether the *Edwards* rule is time-tethered." App., *infra*, 11a.

Third, the court recognized that, before the interrogation, respondent pleaded guilty to the offense with which he was charged when he invoked the *Edwards* right. App., *infra*, 12a-14a. The court noted (App., *infra*, 12a) that this "might seem to be [the government's] most potent argument" for distinguishing *Edwards*, and that cutting off the irrebuttable presumption of *Edwards* when a defendant pleads guilty "promises adherence to the requirement of some form of bright-line rule." The court nevertheless concluded that a plea of guilty "is consistent with [the defendant's] election to communicate with the police only through counsel," and that therefore the continued application of the prophylactic rule of *Edwards* was necessary in the circumstances of this case. App., *infra*, 14a.

The court observed that "it is not unfair to question the logic of a presumption that renders invalid an otherwise knowing, intelligent and voluntary waiver of *Miranda*'s auxiliary protections—and so demands exclusion of a murder confession voluntary in fact—because over five months earlier, in connection with an unrelated crime, the defendant asked for (and was afforded) the assistance of counsel." App., *infra*, 14a-15a. The court added that, if it had reached the wrong result, "then it is for the [Supreme] Court in this case or some future one to provide the *Leitfaden*—the red thread—through its decisions leading to the correct result." App., *infra*, 15a.[3]

Judge Steadman dissented. App., *infra*, 16a-18a. He reasoned that the irrebuttable presumption of *Edwards* should not continue to apply after a suspect waives his Fifth Amendment right against compulsory self-incrimination and pleads guilty to the offense that prompted the invocation of the *Edwards* right. He noted that a guilty plea represents "a sea change in th[e] circumstances which existed at the time the right to counsel was originally invoked." App., *infra*, 16a. Indeed, a guilty plea "entail[s] a knowing, voluntary, and intelligent waiver of the Fifth Amendment right against self-incrimination and its consequent concerns—the very right that *Edwards* seeks to protect." App., *infra*, 18a.

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[3] The court held (App., *infra*, 3a-4a n.1) that this case presents "no issue of violation of [respondent's] right to counsel under the Sixth Amendment." In addition, the court rejected respondent's contention that the government delayed unnecessarily in bringing him to court. App., *infra*, 4a-5a n.2. In the court of appeals, respondent abandoned the contention that his confession was involuntary. *Ibid.*

The government's petition for rehearing en banc was denied by an equally divided vote. App., *infra*, 34a-35a.

REASONS FOR GRANTING THE PETITION

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and subsequent cases, this Court has crafted a set of prophylactic rules to protect the Fifth Amendment privilege in the context of custodial interrogation. The Court has justified creation of each of those rules on the ground that it protects a suspect against inherently coercive pressures of interrogation in a police-dominated setting. When mechanically applied, however, the rules require the suppression of some confessions that were obtained without any hint of coercion or police overreaching, resulting in a large gulf between the rules themselves and the constitutional values that those rules were meant to serve. For such cases, it is essential to the rational operation of the criminal justice system that this growing body of prophylactic rules be limited so that they do not simply result in the gratuitous exclusion of highly probative evidence, without affording any significant protection to the exercise of constitutional rights.

This is such a case. The court of appeals acted under what it understood to be the compulsion of the prophylactic rules of *Miranda*, *Edwards*, *Roberson*, and *Minnick*, although it applied those rules in a context far removed from the facts of each of those four cases. As the court of appeals acknowledged, extending those rules to a case such as this one exacts a high cost, without any clear compensating benefit to legitimate constitutional interests. This Court should grant review to establish that the prophylactic rules governing custodial interrogation need not be applied

in settings where the concerns underlying those rules are not implicated.

1. In *Miranda*, the Court held that before conducting custodial interrogation the police must advise a suspect of his right to remain silent, his right to consult with counsel and have counsel present during any interrogation, his right to have counsel appointed for him if he is indigent, and the consequences of waiving those rights, *i.e.*, that anything the suspect says may be used against him in court. 384 U.S. at 467-473. Those procedures were necessary, the Court concluded, to ensure that the coercive pressures associated with custodial interrogation would not lead suspects to relinquish their privilege against compulsory self-incrimination without understanding the consequences of doing so. *Id.* at 467.

In a series of subsequent cases, the Court has elaborated upon the prophylactic rule established in *Miranda*. Thus, in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), the Court held that once a suspect has expressed his desire to deal with the police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485. In *Arizona* v. *Roberson*, 486 U.S. 675 (1988), the Court extended the principle of *Edwards* to interrogations conducted in the course of separate investigations, holding that a suspect's request for counsel bars subsequent police-intitiated custodial interrogation of a suspect on any subject. *Id.* at 683-685. Most recently, in *Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990), the Court concluded that merely permitting a suspect who has requested counsel to consult with his lawyer before the

police conduct further interrogation is not sufficient to satisfy the *Edwards* rule. Instead, the Court held that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.* at 491.

This case involves the application, in tandem, of each of the four prophylactic rules set forth above, and in a setting that tests the limits of those rules. Thus, this case presents the question whether the principles of *Miranda*, as applied in *Edwards*, require suppression of a voluntary confession obtained more than five months after a suspect invoked his right to counsel in connection with an unrelated offense, and after the suspect consulted with counsel and pleaded guilty to that offense.

The Court has never held that the *Edwards* rule permanently bars a suspect who invokes the right to the presence of counsel during custodial interrogation from waiving that right at the request of the police. Indeed, it is generally understood that the *Edwards* rule does not apply if there has been a break in the suspect's custody, so that the invocation of counsel during one period of custody does not bar police initiation of questioning if the suspect is released and then taken into custody again on another occasion. See *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2208 (1991) (*Edwards* rule applies "assuming there has been no break in custody"); *Dunkins* v. *Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988), cert. denied, 489 U.S. 1059 (1989); *McFadden* v. *Garraghty*, 820 F.2d 654, 661 (4th Cir. 1987); *United States* v. *Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), cert. denied, 463 U.S. 1229 (1983).

Because of his involvement in an unrelated juvenile matter and his conviction on the drug charge, respondent was not released from custody between the time of his arrest on the drug charges and his interrogation on the murder charge five months later. The court of appeals felt constrained by this Court's rulings in *Edwards*, *Roberson*, and *Minnick* to hold that respondent's invocation of the *Edwards* right to counsel barred the police from questioning him on any subject for as long as he remained in custody for any reason. The court therefore held that the police violated the principles of *Edwards* when they approached respondent in January 1990 and sought to question him about the murder, even though they advised him of his *Miranda* rights at that time and he willingly agreed to speak with them.

The court of appeals' application of the *Edwards* rule finds some support in the language of the Court's opinions. See, *e.g.*, *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2210 n.1 (1991) (suggesting that question in determining whether defendant's request for counsel during a judicial proceeding is invocation of *Edwards* right is "whether such a request implies a desire *never* to undergo custodial interrogation, about anything, without counsel present") (emphasis added). As the courts below recognized, however, the result in this case—the exclusion of a voluntary murder confession simply because the suspect asked for and was furnished counsel months earlier in connection with a separate investigation—is not justified by the Fifth Amendment or the purposes underlying the *Edwards* rule. Review by this Court is needed to make clear that *Edwards* does not impose a permanent, unalterable ban on police-initiated custodial interrogation after a suspect's invocation of his right not to be interrogated in the absence of counsel.

2. Several factors distinguish this case from the Court's previous *Edwards* cases and suggest that the *Edwards* rule should have no application here.

a. First, after respondent invoked the *Edwards* right to counsel—but before he was questioned by the police about the murder—respondent entered a plea of guilty to the drug charge that had prompted his invocation of the *Edwards* right. As the Court has recognized, a guilty plea "represents a break in the chain of events which has preceded it in the criminal process," *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), and constitutes a waiver of the Fifth Amendment right not to be compelled to incriminate oneself, *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969); *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). For those reasons, a guilty plea so alters the suspect's situation that courts should not continue to give preclusive effect to the suspect's assertion of the *Edwards* right, when that assertion was made at the time of the suspect's initial arrest and prior to the time the suspect consulted with counsel and appeared in court to make a formal admission of his guilt.

b. Second, five months elapsed between respondent's assertion of the *Edwards* right and the initiation of interrogation by the police. The court of appeals' conclusion that the lapse of time in this case did not justify a departure from the "continuing irrebuttable presumption" imposed by *Edwards*, see App., *infra*, 9a-12a, is inconsistent with the purposes underlying that rule. The *Edwards* presumption is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *McNeil* v. *Wisconsin*, 111 S. Ct. at 2208 (quoting *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990)). As time passes following a suspect's invocation of the *Edwards* right, the risk that reinitiation of interrogation will be perceived by the suspect as "badgering" diminishes. Where months have passed without any effort by the police to question the suspect, there is no reason to presume that an inquiry by the police into whether the suspect wishes to speak to them without counsel will "wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984).

We recognize that consideration of the interval between invocation of the *Edwards* right to counsel and reinitiation of interrogation may undermine the "'clear and unequivocal' character" of the *Edwards* rule to some extent. See *Minnick*, 111 S. Ct. at 492. But the Court has recognized that guidelines for judicial review should be "clear and unequivocal * * * only when they guide sensibly." *McNeil*, 111 S. Ct. at 2211. See also *New York* v. *Quarles*, 467 U.S. 649, 658 (1984) (adopting exigent circumstances exception to *Miranda* even though the exception "to some degree * * * lessen[s] the desirable clarity of that rule"); *Michigan* v. *Mosley*, 423 U.S. 96, 104, 107 (1975) (concluding that police officers "scrupulously honored" the suspect's right to silence when they "suspended questioning entirely for a significant period before beginning the interrogation that led to [Moseley's] incriminating statement"). Because a request to interrogate a suspect on a new subject more than five months after the suspect first invoked his right to counsel does not remotely constitute police "badgering," an absolute prohibition on police-initiated interrogation in this setting does not meaningfully advance the "anti-badgering" purpose for which the *Edwards* rule was designed.

c. Finally, the police initiated interrogation only after respondent had been provided with counsel and had consulted with his lawyer, and the questioning concerned a crime wholly unrelated to the offense that prompted respondent's invocation of the *Edwards* right. Thus, 'this case is unlike either *Arizona* v. *Roberson*, in which the police reinitiated interrogation without honoring the suspect's request for counsel, or *Minnick* v. *Mississippi*, in which the renewed interrogation concerned the same offense that had prompted the suspect's invocation of the *Edwards* right. The fact that counsel was made available to the respondent eliminated the coercive pressure that arises when the police reinitiate interrogation of a suspect who has asked for but not received access to counsel. See *Roberson*, 486 U.S. at 686 & n.6 (discussing coercive effects of refusal to honor request for counsel). And the fact that the interrogation concerned an unrelated offense greatly reduced the possibility that the respondent might be badgered into giving a statement by repeated police-initiated questioning. See *Minnick*, 111 S. Ct. at 491 (discussing "persistent attempts by officials to persuade [defendants] to waive [their] rights").

When a suspect whose prior invocation of the right to counsel has been honored is later approached by the police about a different offense, and is once again given *Miranda* warnings, he will likely understand, not that he is being pestered again by the police, but that he is simply being asked, in the context of the new offense, to make "an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988). If the suspect " 'knowingly and intelligently' pursues the latter

course," there is "no reason why the uncounseled statements he then makes must be excluded at his trial." *Ibid.*

3. This Court has not had occasion to consider whether a suspect's invocation of the *Edwards* right to counsel requires a permanent prohibition on further police-initiated interrogation.[4] Cf. *Minnick* v. *Mississippi*, 111 S. Ct. at 496 (Scalia, J., dissenting) (suggesting that the *Edwards* rule, as currently applied, appears to create a "perpetual irrebuttable presumption"). That question has caused confusion in both federal and state courts, and the courts are divided as to its resolution. Compare *United States* v. *Hall*, 905 F.2d 959, 962-963 (6th Cir. 1990) (*Edwards* rule was inapplicable where defendant requested counsel three months before interrogation; *Edwards* does not "grant * * * such a blanket protection continuing *ad infinitum*"), cert. denied, 111 S. Ct. 2858 (1991), and *State* v. *Newton*, 682 P.2d 295, 297-298 (Utah 1984) (rejecting *Edwards* claim where three months elapsed between invocation of right and reinitiation of interrogation), with *Kochutin* v. *State*, 813 P.2d 298, 304 (Alaska 1991) (*Edwards* rule applies despite one-year interval between invocation of right to counsel and interrogation; "nothing in *Edwards* or in subsequent decisions of the Supreme Court * * * indicate[s] that *Edwards* should be relaxed by the mere passage of time"); *Walker* v. *State*, 573 So. 2d 415, 416 (Fla. Dist. Ct. App. 1991) (noting that *Edwards* presumption could apply "for the rest of the [sus-

[4] In *Edwards*, only one day elapsed between the suspect's invocation of the right to counsel and reinitiation of the interrogation. See 451 U.S. at 478-479. In *Minnick* and *Roberson*, the period was three days. See 111 S. Ct. at 488-489; 486 U.S. at 687.

pect's] life"); and *Commonwealth* v. *Perez*, 581 N.E.2d 1010, 1016-1017 (Mass. 1991) (assuming, without deciding, that *Edwards* rule applies despite six-month interval between invocation and interrogation). See also *Kochutin*, 813 P.2d at 310 (Bryner, C.J., dissenting) ("*Edwards*' bright line is not a laser, buring inexorably through form and substance into infinity.").

The conflict among the courts on the extent to which the principles of *Edwards* continue to apply regardless of the change of circumstances and the passage of time is starkly presented in this case, where not only was there a long period of time between the invocation of the *Edwards* right and the interrogation, but the interrogation was on a separate subject matter and there were significant intervening circumstances —the provision of counsel to the suspect and his plea of guilty to the charges that served as the basis for his initial arrest. This is therefore an appropriate case for this Court to clarify the *Edwards* rule and determine whether, as the court of appeals concluded, that rule applies for as long as the suspect is in custody, regardless of the intervening circumstances.

4. The decision in this case, if allowed to stand, will seriously impede effective law enforcement by requiring exclusion of voluntary, reliable confessions made after valid waivers of *Miranda* rights. In this case, for example, the suppression of respondent's confession may well make it impossible to prosecute him successfully for murder.

Many offenders commit multiple crimes, and it is common for a person under suspicion in connection with one offense to have at some previous point invoked the right to counsel in a separate case. Ironically, a suspect who is discovered after his arrest to

be the subject of a variety of criminal proceedings, and who is therefore held in continuous custody after invoking his *Edwards* right, will be in a better position with respect to subsequent interrogation than a suspect who has no other criminal matters pending against him and is therefore released shortly after his arrest. Thus, the rule adopted by the court of appeals, which permanently forecloses all police-initiated interrogation of such persons while they remain in custody, will impose a high cost in restricting law enforcement efforts in general, and particularly with respect to the repeat offenders who commit a disproportionate number of the nation's crimes. As a result, because "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society [will] be the loser." *McNeil* v. *Wisconsin*, 111 S. Ct. at 2210.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1992

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 91-29

UNITED STATES, APPELLANT

v.

LOWELL GREEN, APPELLEE

Argued April 17, 1991

Decided May 31, 1991

Before ROGERS, Chief Judge, and STEADMAN and FARRELL, Associate Judges.

FARRELL, Associate Judge:

The government appeals from an order suppressing the confession of appellee (hereafter defendant) in this murder prosecution. The trial judge ruled that the police, in eliciting the confession, violated the prophylactic rule of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), as further explained in *Minnick v. Mississippi*, —— U.S. ——, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990). The government argues that suppressing the confession in this case amounts to a wholly unwarranted extension of the *Edwards* rule to circumstances presenting none of the concerns that impelled that decision or its sire, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16

L.Ed.2d 694 (1966). The government's argument has force, as the trial judge recognized; but like the trial judge we conclude that the Supreme Court's teachings in this area so far do not countenance a departure from the "bright-line" rule of *Edwards* in the present circumstances. We therefore uphold the suppression of defendant's confession.

I.

Defendant originally was arrested on July 18, 1989, on a charge of possessing a controlled substance with intent to distribute. He signed a police advice-of-rights (PD 47) form that day and answered "No" in writing to the question whether he was willing to answer questions without having an attorney present. Defendant was presented in court the next day and an attorney was appointed to represent him. He was held on bond until July 28, 1989, when the drug case was dismissed at preliminary hearing. It appears that he was then remanded to the custody of juvenile authorities, presumably in connection with a juvenile matter pending against him at the time. He was subsequently indicted on the drug charge, but failed to appear for his arraignment on August 22, 1989, apparently because he was in the custody of juvenile authorities. When eventually located, he was arraigned in the drug case on September 7, 1989. A bond was imposed and he remained in custody on the bond until September 27, 1989, when he pled guilty to the lesser included offense of attempted possession with intent to distribute cocaine. Following the plea, he was held in the Youth Center at the Lorton Reformatory while a Youth Act Study (D.C.Code § 24-803(e) (1989)) was conducted. On February 26, 1990, he was sentenced to fifteen months' incarceration under the Youth Act.

Meanwhile, on January 4, 1990, while defendant was at Lorton, Detective Donald Gossage of the Metropolitan Police Department obtained an arrest warrant charging him with the murder of Cheaver Herriott on December 30, 1988. Also on January 4, Detective Gossage obtained an order directing that defendant be brought up the next day from the Youth Center to be booked and formally presented on the murder warrant. On January 5, defendant was brought to the police Homicide Office to be booked. Detective Gossage advised him of his *Miranda* rights by reading to him both sides of the PD 47 form. Defendant chose to waive his *Miranda* rights, so indicating by his answers to four questions on the form. After he discussed with Gossage his involvement in the murder of Cheaver Herriott, defendant was again advised of his rights and agreed to make a videotaped statement, in which he confessed involvement in the robbery and killing of Herriott.

Following his indictment on April 17, 1990 on various charges including first-degree murder, defendant moved to suppress his confession on several grounds, chief among them that it had been obtained in violation of *Edwards v. Arizona, supra,* in view of his original refusal—at the time of his arrest on the drug charge—to answer questions without counsel being present. The trial judge heard testimony and initially denied the motion to suppress, concluding that "none of the reasons which underlie [the Supreme] Court's decision[s] which have addressed a criminal defendant's right to [counsel] under the 6th Amendment and his right not to incriminate himself under the 5th Amendment[] would be served by suppression" of defendant's murder confession.[1] The judge em-

[1] The government argues, and we agree, that this case presents no issue of violation of defendant's right to counsel

phasized three points. First, an "extraordinary amount of time [over five months] . . . [had] elapsed between" defendant's invocation of rights in the drug case and his waiver of rights in connection with his confession to murder. Second, although he was under some form of restraint of liberty during the entire five or more months, during the last part of that period he was not being held in jail but rather in the presumably less coercive environment of the Youth Center. Finally, defendant had had the opportunity to consult repeatedly with counsel during the period between his invocation of rights in the drug case and his waiver of rights before his murder confession.

Three days after the court's initial ruling, however, the Supreme Court decided *Minnick v. Mississippi*, *supra*. The judge reconsidered his ruling on the Fifth Amendment issue in light of *Minnick*, noting in particular that the "most significant[]" ground of his ruling had been the appointment of counsel and the opportunity defendant had had to consult counsel in the months prior to the reinitiation of questioning by the police—a factor specifically addressed by *Minnick*, and held not to justify a departure from *Edwards*. On the strength of *Minnick*'s specific holding and its reaffirmation of the "bright-line" test established by *Edwards*, the judge reversed his earlier ruling and ordered the confession suppressed.[2] The government

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under the Sixth Amendment. *See, e.g., Illinois v. Perkins*, —— U.S. ——, 110 S.Ct. 2394, 2399, 110 L.Ed.2d 243 (1990); *United States v. Gouveia*, 467 U.S. 180, 187-88, 104 S.Ct. 2292, 2296-98, 81 L.Ed.2d 146 (1984); *Woodson v. United States*, 488 A.2d 910, 912 (D.C. 1985).

[2] The trial judge adhered to his previous rejection of defendant's claims that his confession was involuntary in fact

noted this timely appeal. D.C.Code § 23-104(a)(1) (1989).

II.

In *Edwards v. Arizona* the Supreme Court held:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. . . . [A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-85, 101 S.Ct. at 1884-85. "Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny." *Patterson v. Illinois*, 487 U.S. 285, 291, 108 S.Ct. 2389, 2394, 101 L.Ed.2d 261 (1988). The Court has further explained that "[t]he merit of the *Edwards* decision lies in the

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and that it was obtained during an unnecessary delay in bringing defendant to court. *See Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957); 18 U.S.C. § 3501 (1988). On appeal defendant does not argue the constitutional involuntariness of the confession as an alternative ground supporting the suppression ruling. He does raise the issue of unnecessary delay, but we reject that claim as did the trial judge. *Bliss v. United States*, 445 A.2d 625, 633 (D.C. 1982), *cert. denied*, 459 U.S. 1117, 103 S.Ct. 756, 74 L.Ed.2d 972 (1983). *See* Super.Ct.Crim.R. 5(a).

clarity of its command and the certainty of its application," *Minnick*, 111 S.Ct. at 490: "the *Edwards* rule provides 'clear and unequivocal' guidelines to the law enforcement profession," *id.* (citation and additional internal quotation marks omitted), and it "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness." *Id.* at 489.

The government, while acknowledging these purposes of the rule, reminds us that the *Edwards* holding, like the seminal rule of *Miranda*, "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." *Connecticut v. Barrett*, 479 U.S. 523, 528, 107 S.Ct. 828, 832, 93 L.Ed.2d 920 (1987). The government points to the Court's statement that "*Edwards* is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Minnick*, 111 S.Ct. at 489 (quoting *Michigan v. Harvey*, 494 U.S. 344, ——, 110 S.Ct. 1176, 1180, 108 L.Ed.2d 293 (1990)); "[t]he rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures." *Id.* The government then mounts a multipronged case for holding that the circumstances of this case insure both that defendant was not "badgered" into revoking his initial election to communicate with police only through counsel and that "the coercive pressures of custody were not the inducing cause" of his confession. *Id.* at 492.

First, the government points out that the police reinitiated questioning only after defendant had been furnished counsel and consulted with him in the drug case, and that the renewed questioning concerned a crime entirely unrelated to the one regarding which

defendant had refused to talk without counsel.[3] These considerations alone cannot support the government's argument. In *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), the Court rejected the argument that the *Edwards* rule "should not apply when the police-initiated interrogation following a suspect's request for counsel occurs in the context of a separate investigation," *id.* at 682, 108 S.Ct. at 2098; "unless he otherwise states, there is no reason to assume that a suspect's state of mind is in any way investigation-specific" when, by requesting an attorney, he has demonstrated his belief "that he is not capable of undergoing [custodial] questioning without advice of counsel." *Id.* at 684, 108 S.Ct. at 2099 (citations omitted), at 681, 108 S.Ct. at 2097. Here, defendant's insistence on answering questions only with counsel present was unqualified. *Compare Roberson* with *Connecticut v. Barrett*, *supra*.

Similarly, in *Minnick* the Court clarified *Edwards*' intent that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation *without counsel present*, whether or not the accused has consulted with his attorney." 111 S.Ct. at 491 (emphasis added). The Court rejected the argument that an intervening "opportunity to consult with an attorney outside the interrogation room" was sufficient. *Id.* at 490. In this case it is undisputed that defendant did not have counsel present when Detective Gossage reinitiated questioning.

The government endeavors to narrow *Roberson* and *Minnick* to their individual settings. As in *Edwards* itself, it says, the accused in *Roberson* was

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[3] Defendant does not dispute that the drug offense to which he pled guilty was factually unrelated to the December 1988 murder that was the subject of his confession.

"denied the counsel he [had] clearly requested" until after the police reinitiated interrogation. 486 U.S. at 686, 108 S.Ct. at 2100. As in *Edwards* too, *Minnick* involved questioning about the same offense which the accused had refused to discuss without counsel being present. The absence of both these factors in this case, the government submits, takes it outside the reach of *Edwards* and its progeny; in particular, as the trial judge found, defendant had had repeated opportunity to consult counsel before the police approached him about the murder. But if *Edwards*, *Roberson* and *Minnick* together teach anything, it is the need for great caution in finding distinctions among cases all involving the paradigmatic original request by the accused for counsel, reflecting "his own view that he is not competent to deal with the authorities without legal advice," *Roberson*, 486 U.S. at 681, 108 S.Ct. at 2098 (citation omitted). The Supreme Court having made clear that police-initiated questioning about a separate offense and questioning after opportunity to consult counsel each fails to justify departure from *Edwards*' "bright-line, prophylactic . . . rule," *id.* at 682, 108 S.Ct. at 2098, we are not convinced that in combination the Court would regard these two factors differently.

The government next distinguishes the *Edwards* line of cases based upon the sheer length of time between defendant's invocation of the right to counsel and the initiation of questioning about the unrelated homicide offense. There is no question that to the extent *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Minnick*, 111 S.Ct. at 489,[4]

[4] "[T]he coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." *Minnesota v. Murphy*, 465 U.S. 420, 433, 104 S.Ct. 1136, 1145, 79 L.Ed.2d 409 (1984) (citing *Miranda*, 384 U.S. at 468, 86 S.Ct. at 1624).

that danger is reduced when the police have made no effort to interrogate the defendant for more than five months after his assertion of rights. *Edwards*, the government argues, rests on the assumption that repeated attempts to initiate questioning will "exacerbate" the "compulsion to speak" already felt by one "who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel," *Roberson*, 486 U.S. at 686, 108 S.Ct. at 2100; and that compulsion must be substantially lessened when the police have avoided all efforts to question the person without counsel for so long a period of time.

These are substantial arguments, but there are weighty considerations on the other side of the ledger as well. Although the trial judge attached significance to the fact that defendant apparently was in the presumably less coercive environment of the Youth Center during much of the five to six-month period, the government concedes on appeal "that defendant in this case was in continuous custody for purposes of the *Edwards* prophylactic rule" (Brief for Appellant at 21 n. 16).[5] In *Minnick*, although the

[5] That concession, which as we understand it relinquishes any argument based on differing degrees of coerciveness in the custodial environment for purposes of this appeal, is probably well-advised. Although courts have recognized that different kinds of custody can be more or less coercive with regard to the possibility of self-incrimination, *see Smith v. United States*, 586 A.2d 684, 685 (D.C. 1991), the record in this case contains sparse indication of the circumstances in which defendant's liberty was restrained at the Youth Center,

relevant interval was only a matter of days, the Court emphasized "the coercive pressures that accompany custody and that may *increase* as custody is prolonged." 111 S.Ct. at 491 (emphasis added).[6] Moreover, except for his ongoing contacts with his custodial caretakers, we must assume that defendant's only contact with law enforcement officials (investigators and prosecutors) during this period was through, or in the presence of, his attorney. Hence there is nothing in the lapse of time itself from which to deduce that his original belief in his vulnerability to the pressures of custodial interrogation had diminished as he progressed through the steps of pleading guilty to the (lesser included) offense of attempted drug distribution; it is just as likely that his sense of dependence on, and trust in, counsel as the guardian of his interests in dealing with government officials intensified.

Furthermore, with the government's argument based upon the lapse of time we are again met with the Supreme Court's insistence that the *Edwards* rule be kept "clear and unequivocal." If five months in custody without evidence of police "badgering" is held sufficient to dispel *Edwards*' presumption that any new waiver of rights is involuntary, then why not three months or three weeks? At what point in time—and in conjunction with what other circum-

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an issue on which the government—with superior knowledge of the circumstances—presumably bore the burden of production, if not proof, below.

[6] *See also Arizona v. Roberson, supra*, 486 U.S. at 686, 108 S.Ct. at 2100 (pointing to the "serious risk that the mere repetition of the *Miranda* warnings would not overcome the presumption of coercion that is created by prolonged police custody").

stances—does it make doctrinal sense to treat the defendant's invocation of his right to counsel as countermanded without any initiating activity on his part? The government is candid in admitting that a focus on the lapse of time—three days versus three weeks versus three or five months—risks obscuring *Edwards*' lucid rule, but argues that this reversion to *some* sort of case-specific consideration of circumstances is inevitable if *Edwards* is not to become a caricature of itself on facts such as presented here. In his dissent in *Minnick* Justice Scalia likewise scorned what he termed the "perpetual irrebutable presumption" erected by *Edwards* and its progeny, necessitating the same result if the intervening period "had been three months, or three years, or even three decades." 111 S.Ct. at 496.[7] Ultimately, given its emphasis on the need for a bright-line rule in this area, we think only the Supreme Court can explain whether the *Edwards* rule is time-tethered and whether a five-month interval, during which no efforts at custodial interrogation took place, is too long a period to justify a continuing irrebuttable presumption that any police-initiated waiver was invalid. Until the Court provides further guidance, we are persuaded that so long as

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[7] *Amicus* the Public Defender Service points out that even if *Edwards*' presumption of involuntariness is unaffected by the passage of time or later events, it rationally "can apply only to crimes which have already occurred [and not to future crimes,] since the suspect cannot possibly be asserting a right to refuse to answer questions which could not possibly be posed." PDS thus disputes the notion that the *Edwards* rule, unless in some way time-restricted, admits of no "reasonable limiting principle." The government essentially replies that this limitation to crimes already committed is small comfort to "the public's [legitimate] interest in the investigation of criminal activities." *Maine v. Moulton*, 474 U.S. 159, 180, 106 S.Ct. 477, 489, 88 L.Ed.2d 481 (1985).

the defendant remains in custody the fact that the police did not reinitiate interrogation until five months after he invoked his right to counsel cannot be adequate reason, alone or combined with the factors already treated, to justify a departure from *Edwards*' command.[8]

The government, however, has saved what might seem to be its most potent argument until last, one that promises adherence to the requirement of some form of bright-line rule. Although defendant was still in custody awaiting sentencing when the police reinitiated questioning, he had pled guilty months earlier in the drug case that caused his arrest and invocation of rights. As the government points out, *Edwards* itself does not make its prophylactic ban permanent: the accused can lift it by reinitiating conversation with the police about the crime. Similarly, several courts have held that *Edwards*' presumption of involuntary waiver fades when the accused is released from custody.[9] The government urges that, so too, "the defendant's knowing, voluntary, and intelligent decision [here], arrived at with the advice of counsel, to plead guilty to the drug offense represents a break in events sufficient to sever

[8] Strictly speaking, we have no occasion to decide whether different considerations would come into play if the defendant, although still in custody, were transferred to the general prison population following imposition of sentence. Appellant remained in custody pending sentence on the drug charge at the time the police approached him about the murder.

[9] *E.g., Dunkins v. Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988), *cert. denied*, 489 U.S. 1059, 109 S.Ct. 1329, 103 L.Ed.2d 597 (1989); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3569, 77 L.Ed.2d 1410 (1983); *People v. Trujillo*, 773 P.2d 1086, 1091-92 (Colo. 1989) (en banc).

any link between the defendant's invocation of his *Miranda* right to counsel in connection with the drug case and police interrogation about the entirely separate crime of murder." Just as the prosecution may show "a sufficient break in events to undermine the inference that [a] confession was caused by [a] Fourth Amendment violation," *Oregon v. Elstad*, 470 U.S. 298, 306, 105 S.Ct. 1285, 1291, 84 L.Ed.2d 222 (1985), so the knowing, voluntary and intelligent waiver of Fifth Amendment protections represented by a presumptively valid guilty plea undermines the assumption that a subsequent waiver of *Miranda* rights was the product of police coercion.

There is no question that defendant's intervening plea of guilty distinguishes this case factually from *Edwards* and succeeding cases, and it is also true that in important respects "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973). Nevertheless, we must decide whether by pleading guilty in the drug case defendant can be said to have "reopened the dialogue with the authorities" within the meaning of *Edwards*, 451 U.S. at 486 n. 9, 101 S.Ct. at 1885, n. 9, so as to validate his waiver of rights and interrogation on the murder charge. Defendant points out that he retained his privilege against self-incrimination on the drug charge until sentencing,[10] but that fact is not decisive; the police had little interest in gathering additional evidence of the drug charge. Rather, the answer is implicit in our foregoing discussion. Defendant pled guilty with the advice and assistance of coun-

[10] *See Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Boswell v. United States*, 511 A.2d 29 (D.C. 1986).

sel. Hence while the knowing and voluntary plea presumably demonstrated that acceptance of personal responsibility and not the pressures of custody caused him to incriminate himself, it also was consistent with his original election to deal with government officials only through an attorney. Indeed, from defendant's viewpoint the fact that counsel had negotiated a plea to a lesser charge sparing him a mandatory-minimum sentence, D.C. Code § 33-541(c)(1)(A) (1990 Supp.), would only have confirmed the wisdom of his choice to insist on the shield of legal representation. If defendant had other criminal involvement to conceal, or if he merely feared that he would be wrongly implicated in crimes committed by someone else, in either case we must assume he chose the shelter afforded by *Miranda* and *Edwards* to insure that the coercive pressures of custody did not cause him to incriminate himself. Defendant's plea of guilty in the drug case, because it is consistent with his election to communicate with the police only through counsel, cannot be the pivotal break in events that *Edwards* demands before a waiver can be regarded as an initial election by the accused to deal with the authorities on his own.

III.

The *Edwards* rule, like the rule of *Miranda* itself, remains "an auxiliary barrier against police coercion," *Connecticut v. Barrett*, 479 U.S. at 528, 107 S.Ct. at 832 (emphasis added). Hence it is not unfair to question the logic of a presumption that renders invalid an otherwise knowing, intelligent and voluntary waiver of *Miranda*'s auxiliary protections—and so demands exclusion of a murder confession voluntary in fact—because over five months earlier, in connection with an unrelated crime, the defendant

asked for (and was afforded) the assistance of counsel. But this Court's task is to construe the teachings of the Supreme Court as faithfully as it can in constitutional matters. In this case we have tried not to rely merely on "broad language" in *Edwards*, *Roberson* and *Minnick* which the government admits tends to neutralize the distinguishing features of this case,[11] but instead to ask whether, fundamentally, the Court would regard the custodial circumstances of this case as presenting a "situation[] in which the concerns that powered [both *Miranda* and *Edwards*] are implicated." *Berkemer v. McCarty*, 468 U.S. 420, 437, 104 S.Ct. 3138, 3149, 82 L.Ed.2d 317 (1984). In *Minnick* the Court summarized those concerns and purposes, stated that "[t]he *Edwards* rule sets forth a specific standard to fulfill these purposes," and admonished that "we have declined to confine [the rule] in other instances," *Minnick*, 111 S.Ct. at 492 (citing *Roberson*). On balance, we are left unpersuaded that the Court would confine it in the present situation either, despite the accumulation of distinguishing features the government can point to. If that judgment is wrong, then it is for the Court in this case or some future one to provide the *Leitfaden*—the red thread—through its decisions leading to the correct result.

The order suppressing defendant's confession is

Affirmed.

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[11] In general, the Supreme Court has cautioned that "words of . . . opinions are to be read in the light of the facts of the case under discussion. . . . General expressions transposed to other facts are often misleading." *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S.Ct. 165, 168, 89 L.Ed. 118 (1944); *see also Air Courier Conference of America v. American Postal Workers Union*, —— U.S. ——, 111 S.Ct. 913, 920, 112 L.Ed.2d 1125 (1991).

STEADMAN, Associate Judge, dissenting:

The bottom-line issue in this appeal is the degree to which the rule of *Edwards* and its progeny is to extend durationally beyond the paradigm situation involved in those cases: prearraignment continuous custody by arresting officers. *See Minnick v. Mississippi*, —— U.S. ——, 111 S.Ct. 486, 492, 112 L.Ed.2d 489 (1990) ("[w]e are invited by this formulation to adopt a regime in which *Edwards*' protection could pass in and out of existence multiple times prior to arraignment, at which point the same protection might reattach by virtue of our Sixth Amendment jurisprudence").

As reiterated in *Minnick*, the protection of *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," and "to ensure that any statement made in subsequent interrogation is not the result of coercive pressures." 111 S.Ct. at 489 (citation omitted). It seems to me that the government is correct in its assertion that when an event occurs which represents a sea change in those circumstances which existed at the time the right to counsel was originally invoked, the irrebuttable presumption against a voluntary waiver of the *Miranda* right to counsel should likewise cease. I believe the Supreme Court would so rule.[1] *Cf. Oregon v. Elstad*, 470 U.S. 298, 306, 105 S.Ct. 1285, 1291, 84 L.Ed.2d 222 (1985) (prosecution may show "a sufficient break in events to undermine the inference that [a] confession was caused by [a] Fourth Amendment violation"); *Miranda v.*

[1] I recognize that Justice Scalia in his dissent in *Minnick* characterizes the majority as announcing a "perpetuality of prohibition", 111 S.Ct. at 496, but that interpretation does not, of course, speak for the full court.

Arizona, 384 U.S. 436, 496, 86 S.Ct. 1602, 1639, 16 L.Ed.2d 694 (1966) (requirement of a break in the stream of events).

It is conceded that *Minnick* constitutes no bar to questioning about a crime occurring *subsequent* to the invocation of the right to counsel. Far short of that, a number of cases have recognized that where a suspect has been released from custody and subsequently again detained, even for the same crime, an invocation of the right to counsel during the original confinement does not prevent the police from seeking a waiver of such a right upon the new confinement. *See, e.g., Dunkins v. Thigpen*, 854 F.2d 394, 397 (11th Cir.1988), *cert. denied*, 489 U.S. 1059, 109 S.Ct. 1329, 103 L.Ed.2d 597 (1989); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir.1982), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3569, 77 L.Ed.2d 1410 (1983).[2]

Similarly, I believe that the government is correct in its assertion that when a defendant has pled guilty to the charge which prompted the invocation of the right to counsel, circumstances have so significantly changed that any coercive effect created by the original confinement must be deemed to have been dissipated, certainly with respect to questioning about an entirely separate and distinct crime. A suspect's concern about self-incrimination that may exist during pre-trial detention must be dramatically affected once, with the advice and assistance of counsel and subject to the elaborate protections provided by Rule

[2] Here, for several months following his invocation of the right to counsel, appellant as a juvenile was apparently held not in any jail or prison as such but rather was in the custody of juvenile authorities. Nonetheless, the government for purposes of this appeal assumes that the appellant was in continuous custody for purposes of the *Edwards* prophylactic rule, and I deal with the appeal on that basis.

11, he has appeared in court and been convicted from his own mouth. Such an event entailing a knowing, voluntary and intelligent waiver of the Fifth Amendment right against self-incrimination and its consequent concerns—the very right that *Edwards* seeks to protect—should undermine any irrebuttable presumption that a subsequent waiver directed toward an entirely unrelated crime is the product of continuing police coercion. I would so hold.

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No. F 265-90

UNITED STATES OF AMERICA

vs.

LOWELL GREEN, DEFENDANT

Washington, D. C.

Wednesday, November 28, 1990

The above-entitled action came on for a motions hearing before the Honorable HENRY KENNEDY, Associate Judge, in Courtroom Number 102 commencing at approximately 11:40 a.m.

APPEARANCES:

On behalf of the Government:

LISA PRAGER, Esquire
Assistant United States Attorney

On behalf of the Defendant:

JOSEPH CONTE, Esquire
Washington, D. C.

* * * * *

THE COURT: The matter presently before the Court is the Defendant's Motion to Suppress the statements which the Government indicates it wishes to use as evidence in this case, some of which were videotaped on January 5th, 1990.

The Court has reviewed the papers filed in connection with this motion and considered the argument of Counsel and has had an opportunity to consider the testimony of the witnesses.

Initially the Court knows that its ruling as to whether Mr. Green's statement was given voluntarily and after being given and then waiving his Miranda Rights depends upon its assessment as to the credibility of the witnesses.

There are only three possible alternatives as to what happened after Mr. Green was brought to the Homicide Office of the Metropolitan Police Department shortly after eleven o'clock a.m. on January 5th, 1990.

Mr. Green's account, Detective Gossage's account or a scenario which might emerge from the different accounts of the two.

The Court has no reason to discern a scenario which is different from that of Mr. Green and Detective Gossage. And as between those two accounts, that is the account given by Mr. Green and Detective Gossage, the Court credits Detective Gossage's account for the following reasons and based upon the following factors.

One. Nothing which he said is inherently [in]-credible. Two. While Detective Gossage does have a professional interest in this case and indeed, is in the business of ferr[e]ting out crime as he had been in January of 1990 for seventeen years, that interest pales when compared with the interests of Mr. Green in giving testimony which would serve his interests

in having this very damaging piece of evidence, or pieces of evidence, suppressed.

Three. Mr. Green has been previously convicted of a crime, a fact which the Court may and does consider in assessing his credibility.

And four, the evidence which is present for all to see and hear which contradicts some of Mr. Green's sworn testimony at the Motions Hearing.

For example, when questioned at the motions hearing whether he had received lunch at the police station he indicated unequivocably that he had not.

This conflict[s] absolutely and without explanation with his statement made on the videotape that he had been given lunch. At the motions hearing Mr. Green was questioned as to whether he was threatened, he indicated that he had been.

The threats, I suppose, that are being referred to is the threat of receiving—being charged with two offenses unless he gave a statement.

On the videotape, while it's not quite so clear as to what was meant and so it's not as clear[ly] in conflict as the testimony concerning the giving of the lunch, he testified that he had not been threatened.

The Court has reviewed the deposition of Ms. Mary Taylor and with respect to that testimony simply does not attach the same significance to it as Mr. Green does.

In any event, it's clear that Ms. Taylor is not able to [in]voke either Mr. Green's 5th or 6th Amendment right no[r] to have Counsel. Having made this credibility finding which leads the Court to conclude that Mr. Green was brought to the Homicide Office of the police department, was given his Miranda Rights in the way in which Detective Gossage testified they were given on the stand, that Mr. Green understood

his rights and that he appreciated them and thereafter waived them, the Court finds no basis to suppress any of these statements on the ground that they were given in violation of Miranda or were involuntarily made.

To move to the next prong of the Defense argument, the Court is of the view that a very very serious question is raised as to whether these statements should be suppressed as a result of the Supreme Court holdings in Roberson vs. Arizona, unlike the case of Espinosa, to which reference has been made, sets forth controlling preceden[t] for this Court.

Roberson vs. Arizona—Arizona vs. Roberson extended the rule of Arizona vs. Edward[s] which held that a suspect who has "expressed his desire to deal with the police only through Counsel is not subject to further interrogation by the authorities until Counsel has been made available to him unless the accused himself initiates further communications."

In Roberson, the accused was arrested on the scene for a just completed burglary and indicated that he did not wish to speak with the authorities without a lawyer.

Three days later while the accused was still in custody pursuant to the arrest three days earlier, a different police officer inquired about another burglary that had been committed the day before the suspect was arrested.

This officer, that is, the second interrogating officer, had given the Defendant his Miranda rights which presumably were effective in the absence of the Supreme Court's ruling that the giving of the rights w[as] ineffective as a matter of law.

To advise the Defendant of his rights under the 5th and 6th Amendment the Supreme Court held that

the rule which it had laid down in Arizona vs. Edwards applied and required suppression of the Defendant's statement. And the fact that the subsequent interrogations by the police concern[ed] an offense unrelated to the prior offense about which the suspect refused to speak without a lawyer, or that the second interrogating official did not know that the suspect had earlier requested a lawyer before speaking with the police, did not matter.

The Court emphasized the fact that the presumption raised by a suspect's request for Counsel that he considers himself unable to deal with the procedures of custodial interrogation without legal assistance does not disappear simply because the police ha[ve] approached the suspect still in custody, still without Counsel, about a separate investigation.

In this Court's view the provision of Counsel to Mr. Green prior to his interrogation in this case is a significant and dispositive factual distinction which leads the Court to find that Arizona vs. Roberson does not require suppression of the statement.

The precise holding of Roberson is that a criminal suspect who has expressed a desire to deal with the police only through Counsel is not subject to further interrogation even with respect to a subsequent unrelated offense by the authorities until Counsel has been made available to the suspect or unless the suspect initiates further communications.

The Court admits that there are broad statements of law set forth in Roberson which if followed to the letter would require suppression of the Defendant's statement in this case.

For example, the Supreme Court discussed at length the case of Edward[s] vs. Arizona. The Court in Roberson noted that in Edwards it reconfirmed the view which it had expressed in Miranda, the views

expressed—its views expressed in Miranda and to lend substance to such views "emphasized that it is inconsistent with Miranda and its progeny for the authorit[ities] at their instance to reinterrogate an accused in custody if he has clearly asserted his right to Counsel.

We concluded that interrogations may only occur if the accused himself only initiates further communication."

The Court also expressed "that if a suspect believes that he is not capable of undergoing such questioning without advice of Counsel, then it is presumed that any subsequent waiver that has come at the authorities[']' bequest and not the suspect's own instigation is itself the product of the inherently compelling pressures and not the purely voluntary choice of the suspect."

Moreover this Court, as it stated during the course of argument in this case, is given reason to pause by the d[iss]ent of Justice Kennedy in the Roberson case which anticipated precisely the significance of the majority decision in Roberson for the factual scenario which is presented here.

A[c]knowledging its concern, the Court is reminded of the words of our Court of Appeals in the case of Craft vs. Craft and the Supreme Court's decision in Armour vs. Waintok, Craft vs. Craft, Armour vs. Waintok. Neither of these are criminal cases, the cites are Craft vs. Craft, 155 At.2d. 910, a 1959 case. Armour, A-r-m-o-u-r and Company vs. Waintok, 323 U.S. 126, a 1944 case.

"It is well to remember that significance is given to broad and general statements of law only by comparing the facts from which they arise with those facts to which they supposedly apply.["]

The record in this case memorializes the great difference between the factual scenario in Roberson and that of the case at bar. Among those are one, the extraordinary amount of time which elapsed between Mr. Green's invocation of his desire to speak only with Counsel present in July of 1989 and the subsequent waiver of such right—in excess of five months later in January of 1990.

Two. Unlike in Roberson, Mr. Green was not continuously in custody of the police and therefore arguably subject to the same coercive pressures in January 1990 as he was in July of 1989.

In fact, Mr. Green was in the custody of the Department of Corrections during the last portion of the time between July 1989 and January 5, 1990 and not with the police during the course of his testimony. Mr. Green gave some hint as to what his day-to-day life was like at the Youth Center.

That is, he was being studied for a Youth Act study. He had to get up to go to his programs. The point is that unlike the cases that have dealt with this issue, Arizona vs. Edwards and Roberson vs. Arizona, the Espinosa case and there are other cases none really on point as much on point as those that I have discussed, it simply cannot be said that there was the same type of custody.

But most important that it just can't be said that the same coercive pressures were at stake. But most significantly, of course, and the l[i]nch pin, it seems to me of the Court's decision in Arizona and the one which the Court finds dispositive in this case along with the others, is that Mr. Green in fact had been appointed an attorney in July of 1989 with whom he could have talked had he decide[d] to do so when he was asked in January of 1990 whether he was willing to talk with a lawyer.

The Court notes that the Supreme Court has never said that the investigative technique of questioning suspects is a tainted process. Under the facts of this case unless the technique itself is considered to be tainted, none of the reasons which underlie the Court's decision[s] which have addressed a criminal defendant's right to cancel [*sic*] under the 6th Amendment and his right not to incriminate himself under the 5th Amendment, would be served by suppression of these statements.

Moving on to the third prong of Mr. Green's argument in favor of suppression that his statements were taken in violation of 18 USC Code 3501C for [*sic*] D.C. Code, Section 140 and the principle set forth in the case of McNab[b] vs. United States and Mall[o]ry vs. United States.

The Court notes that the Defendant's argument in this regard depend[s] upon a finding that he was arrested at sometime other than when Detective Gossage informed Mr. Green that he was under arrest.

The Court is unable to be precise in its finding of when it is that Detective Gossage indicated that Mr. Green was under arrest. I simply failed to note it in my notes and do not have an independent recollection of when he said it was that he gave the specific time.

What he stated was that Mr. Green arrived at the Homicide Branch shortly—at 11 o'clock a.m. or shortly thereafter. That he exchanged what I would call a salutation with Mr. Green and told [him] that he would be with him later.

It is the Court's belief that Mr., based upon Detective Gossage's testimony, that Mr. Green was told that he was under arrest or was being placed under arrest about one-half to forty-five minutes later.

The Court is aware that the Rights Card was executed at 12:05, but I will go on and frankly, Counsel, if—I think you understand my ruling.

I credit Detective Gossage's testimony so it is what it is and so if there is in the record testimony as to when this man was placed under arrest, it speaks for itself. But I think that the Court announces of this will not—that it simply won't make any difference.

Even if the Court should determine that an arrest took place sometime prior to this time, that is, when Detecti[v]e Gossage says you are under arrest, it clearly would not have been before 10:17 a.m. when officers of the Metropolitan Police Department took Mr. Green from the custody of the United States Marshal service and it is clear that that is when the transfer took place.

The Court relies upon the—a paper which I don't know whether it bears a number or not which I think it should, but it's—it's a paper which has at the top United States—U.S. Department of Justice, United States Marshal Service, time out 10:17, and I do believe that this paper should be made part of the record, the Court has considered it.

It's at that time at the earliest, and the Court believes that it is probably the case that that is when the time should begin to run. It shouldn't be that an officer's statement, you are under arrest, provides the, you know, the time period.

It's that time when Mr. Green was taken into custody by the Metropolitan Police Department pursuant to an arrest warrant that had been previously sought and approved by a Judge.

Using the time of 10:17 at the earliest as a bench mark, Mr. Green began giving his statement after voluntarily waiving his rights not to speak at all or

without the presence of an attorney shortly after executing the PD47 at 12:05 p.m. within two hours of his arrest.

Having voluntarily beg[u]n his statement in the absence of Mr. Green's request to cease talking, the Court is unaware of any principle which would require the police to stop their questioning at 1:17 p.m. even if for the Court to determine that Title 4, D.C. Code Section 140 applies rather than 18 USC 3501C.

In the Court's view the videotaping was simply a continuation or memorialization of the same statement which Mr. Green gave to Detective Gossage that began sometime earlier. And again, the Court affixes that time at some time between 11:30 and 11:45.

With reference to the issue of which of the statutory provisions apply the Court would simply note that it is probable, it is probably the case the 18 USC 3501C rather than Title 4, Section 140 which applies in view of the fact that 350[1]-C is later in time and is the statutory provision which is specifically referred to [in] Rule 5A of this Court, the Court further doubts that the rule of lenity applies to the statute which governs the admissibility of evidence even if that evidence is evidence which [is] sought to be admitted in a criminal case as [im]pposed to statutes which set[] forth the elements of offenses and the punishment which might be opposed upon convictions of offenses.

The Court further notes that cases of United States vs. Pettyjohn which is good law in this jurisdiction hold that with respect to the Defendant's right to a speedy presentment before a magistrate, the Defendant's waiver of his 5th Amendment privilege also is a waiver of that right for the time, for that period of time when the statement is being made and that subsequent delay is not to be given retroactive effect.

The Court therefore denies for the reasons stated th[e] Defendant's Motion to Suppress the statements in this case. And whiie we are at this point, I believe it would be prudent to mark all of the matters to which the Court has indicated that it has taken into consideration but which perhaps formerly w[ere] not admitted into evidence.

I have in mind the booking order itself and the—I don't know what you would call this, it's a caption that reads, Prisoner Remand or Order to Receipt for United States Prisoner. That's at least what I would suggest.

The Court also, while it did not make reference to the form which sets forth the condition of release of Mr. Green in the July case, clearly indicates that he was appointed an attorney. At least that's what I believe should happen. I will hear what you have to say if you think not.

MR. CONTE: That's fine, Your Honor. My only problem is that I didn't know until—the issue of constant incarceration is just not an issue I was prepared to address. My client advises me that he was in fact in continuous incarceration from July 19th.

THE COURT: The record should be clear that that's what I had assumed.

MR. CONTE: The Court stated that he was not. I thought he was not either.

THE COURT: No, no, no, the Court assumes that from July 19, 1989 through January 5, 1990, he was in custody clearly, that is, that he was not free to go home.

The distinction the Court draws is between being in custody of the police, in the custody of the police, first of all, because he was not in the custody of the police, he was in the custody of the Department of Corrections and the kind of custody.

I mean, I just don't—this is a great case for great minds to draw these distinctions, you know. But it seems to me that it's a difference between always sitting at the jail three days, four days, and going down to the Youth Center, being talked with by psychiatrists, psychologists, and being involved in programs and so on and so forth.

That seems to me to be a different kind of custody. I did not mean to suggest or to find that Mr. Green was in—was free. That's not what the Court meant to say. All right. Anything else?

MS. PRAGER: No, Your Honor. I can't remember if Mr. Conte tendered the document or the Defense—it doesn't matter, we can have it marked as Government's or Defendant's exhibits. Mr. Conte knows which belongs to whom.

MR. CONTE: It does not matter for the record.

THE COURT: Let's call these Government's Exhibits and let's make sure that they are in the record and labeled correctly.

MR. CONTE: I suppose that the Rights Card from the July 19th, 1989 matter should be a part of the record and it's attached as an addendum in my motion.

THE COURT: Yes, I think that it should be. Do you have any objection to that?

MS. PRAGER: No, Your Honor.

* * * * *

APPENDIX C

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No. F265-90

UNITED STATES OF AMERICA

vs.

LOWELL GREEN, DEFENDANT

Washington, D. C.
Tuesday, December 4, 1990

The above-entitled action came on for trial before the Honorable HENRY H. KENNEDY, Associate Judge, in Courtroom Number 102, commencing at approximately 10:1[illegible] m.

APPEARANCES:

On behalf of the Government:

LISA PRAGER, Esquire
Assistant United States Attorney

On behalf of the Defendant:

JOSEPH R. CONTE, Esquire
Washington, D.C.

* * * * *

THE COURT: The Court is of the view that with the latest pronouncement from the Supreme Court, the highest Court of this land, given its interpreta-

tion of the decisions which preceded the case of *Arizona vs. Edwards*, that the decision requires suppression of the statement; that the Supreme Court has set up, as mandated, a bright, quote, unquote, bright line test, and that is one of the problems, in my view, of bright line tests. They kind of do not permit for the type of individual consideration of the facts which precedent, which do not set forth such bright lines permit.

The record is clear as to what the Court has found to be the case here. And I suppose what is required is that whenever a person is in custody, the police must check to see whether counsel has been appointed, and then before questioning that person, confer with counsel.

I believe that the Minnick Case requires this result, and so the Court reverses its ruling made on Friday and grants the motion, the defense motion to suppress the—all of the statements which were under consideration, both the oral statements to Detective Gossage, as well as the videotape memorialization of it. That's the Court's decision.

MS. PRAGER: Your Honor, given the Court's decision, the Government is requesting the 30-day continuance, which I believe we're entitled to to decide whether we're going to pursue an appeal.

THE COURT: All right. I don't have my calendar down here. Suggest a date in 30 days.

MR. CONTE: I would object, just for the record, Your Honor.

THE COURT: You object to?

MR. CONTE: I would object to any continuance. The jury is here. We haven't sworn them. We did request this Court swear the jury yesterday.

THE COURT: Yes. And I just smile, because,

boy, these rules are so complex. But, I think that the statute does permit the Government 30 days, does it not?

MS. PRAGER: Yes, Your Honor. And I think in this circumstance we can certainly—I'm personally certifying to the Court that the video taped statement is a substantial piece of evidence that the Government would use in its case-in-chief, and that this appeal, should it be taken, would not be taken for delay. And I think that with those representations, we are entitled to the 30-day continuance.

* * * * *

APPENDIX D

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 91-29

UNITED STATES, APPELLANT

v.

LOWELL GREEN, APPELLEE

Before: *Rogers, Chief Judge; Ferren, Terry, *Steadman, Schwelb, *Farrell, Wagner, and King, Associate Judges.

ORDER

[Filed Nov. 25, 1991]

On consideration of appellant's petition for rehearing or rehearing en banc, the response and the opposition thereto, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that a majority of the judges of this court has not voted to grant the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Associate Judges Steadman, Schwelb, Wagner, and King voted to grant rehearing en banc.

Copies to:

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[Frederick Beane]
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